



July 31, 2001

Ms. Amanda Crawford
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2001-3310

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150066.

The Office of the Attorney General (the "OAG") received a written request for, among other things, all vendor responses to Request For Offer # 237230 (the "RFO") for a "Locate and Asset Search System On-Line" system. You state that most of the requested information has been released to the requestor. You contend that all tax statements submitted to the OAG in connection with the RFO are made confidential under federal law, and therefore, must be withheld from disclosure pursuant to section 552.101 of the Government Code. You also suggest that portions of two responsive proposals, which you have submitted to our office for review, may be excepted from public disclosure pursuant to section 552.110 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) After reviewing the information at issue, we agree that the tax statements you submitted to this office constitute confidential "tax return information" and, as such, must be withheld in their entirety pursuant to federal law. *See* 26 U.S.C. § 6103.

As noted above, you have requested a decision from this office with regard to the remaining information at issue pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure. You have submitted to this office documents from two companies, the Lexis-Nexis Group ("Lexis-Nexis") and DCS Information Systems ("DCS"), that you assert are responsive to the request. This office did not receive any comments from Lexis-

Nexis indicating that they wished to have their records withheld from the public. Consequently, this office has no basis on which to conclude that any of the information contained in the Lexis-Nexis proposal is excepted from disclosure under the Public Information Act. Accordingly, we conclude that the OAG must release the Lexis-Nexis proposal in its entirety.

On the other hand, this office received comments from DCS as to why particular portions of its proposal are excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code.¹ Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 552.104 is to protect the *government's* purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders.² Consequently, no portion of the DCS proposal is excepted from public disclosure under section 552.104.

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. DCS contends that specific portions of its proposal are protected by both prongs of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ *See id.* This office has held that if a governmental body takes no position with

¹Although DSC also raises section 552.101 of the Government Code, they did not explain the applicability of this exception to the information at issue. We therefore consider only the applicability of sections 552.104 and 552.110.

²We also note that section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2

regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. See Open Records Decision No. 552 at 5-6 (1990).

DCS contends that the portions of its proposal that reveal the source of DCS's data constitute trade secret information. After reviewing DCS's arguments and the information at issue, we conclude that DCS has established a *prima facie* case that the source of DCS's data constitutes trade secret information and, thus, must be withheld from the public pursuant to section 552.110(a). We have marked the information that the OAG must withhold under section 552.110(a).

DCS also contends that information identifying its customers is trade secret information. However, none of the documents you submitted to our office contains customer information. Accordingly, we do not reach this issue here.

DCS also contends that its financial statements submitted to the OAG in connection with the RFO are protected from public disclosure as "commercial and financial information" under section 552.110(b). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999); see also *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In this instance, DCS has demonstrated how the release of its financial statements would result in substantial competitive injury. Accordingly, the OAG must withhold all DCS "Balance Sheets," DCS "Operating Statements," and the DCS "Audited Financial Statement" in their entirety from disclosure pursuant to section 552.110(b) of the Government Code. Except for the tax statements at issue, which must be withheld pursuant to section 552.101, the remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

(1982), 255 at 2 (1980).

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/seg

Ref: ID# 150066

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